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# Mediation in Child Custody Disputes and a Look at Louisiana

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## Mediation in Child Custody Disputes and a Look at Louisiana

In recent years the theory of divorce has shifted away from its ancient focus on supplying a remedy for an innocent spouse and punishment of the guilty one whose breach of the marriage contract caused the breakdown of the marriage. Modern divorce law focuses on the financial aspects of dissolution of a marriage without the necessity of placing fault;<sup>1</sup> however, most of the new no-fault divorce laws are based on an assumption of equality that simply does not exist. These laws fail to realistically consider two points that must now be grappled with.<sup>2</sup> First, in our society today, women are simply not the economic equals of men. For a divorcing couple who must rely mostly on earned wages for their support, the statistics are bleak for working women. Although women have narrowed the gender gap, the sixty-two percent of women who perform traditionally "women's jobs" (occupations in which at least seventy percent of all employees are female) are generally paid less than men doing comparable work.

In 1986, women working full time earned about sixty-nine cents for every dollar earned by their male counterparts. The difference between women's and men's wages was greatest among whites, with women earning sixty-eight per cent of what men earn, and least among blacks, at eighty-three per cent, with Hispanics at eighty-one per cent.<sup>3</sup>

At present, when parents divorce, the living conditions of the children are "inextricably tied up with the economic future of their mothers,"<sup>4</sup> and divorced women with dependent children generally suffer a steep decline in standard of living.<sup>5</sup>

The second point that modern divorce law fails to consider adequately is that marriage and parenthood generate responsibilities that

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1. J. Green, J. Long & R. Murawski, *Dissolution of Marriage: Family Law Series* 4 (1986) [hereinafter Green, Long & Murawski].

2. Mulroy, *Are Women Losing the Battle? No-Fault Divorce*, A.B.A.J., Nov. 1989, at 77 [hereinafter Mulroy].

3. N. Folbre, Chapter Three: Women, in *A Field Guide to the U.S. Economy* 3.5 (1987).

4. Mulroy, *supra* note 2, at 77-78.

5. *Id.* The author of this article cites the data results of a 10-year study. The "data demonstrated that divorced women with dependent children experienced a seventy-three per cent decline in their standard of living during the first year after divorce." Men, in contrast, experienced a 42% increase.

are not subject to a quick fix. Many children, after enduring the trauma of their parents' divorce, must then deal with the complexity of family relationships that remarriage or other restructuring of family-like relationships can bring. In addition to biological parents and siblings, many children have half-siblings, stepparents, stepsiblings, stepgrandparents, children of a parent's live-in lover, and countless aunts, uncles, and cousins.<sup>6</sup> Furthermore, there is the real possibility that the second marriages of the child's biological parents may fall into the sixty percent projected to end in divorce, "sending everybody—parents and children—into a new emotional maelstrom."<sup>7</sup> The list of problems children encounter after separation of their parents reads almost like a general catalog of psychological maladjustments: denial of separation, grief, sadness and depression, fear of abandonment, actual abandonment, running away from home, immaturity (regression), hypermaturity, blame, guilt, reconciliation preoccupations, sexual and identification problems, insecurity and low self-esteem, and anger.<sup>8</sup> Reactions of children to divorce can be specific, as the ones listed above, or they can be general and diffuse.<sup>9</sup> Effects of divorce even spread beyond the family affected. Children of intact families often worry that their own parents may divorce when they see their friends' families splitting up.<sup>10</sup> Some children fare better than others, of course, but it seems virtually impossible to find any work that mentions children in association with divorce that does not contain some statement of awareness of the potential trauma for children when their parents separate.

There are many problems in modern divorce law that must be addressed. This paper deals solely with some of the multi-faceted difficulties challenging the legal system as it confronts the complex task of deciding custody when parents legally separate or divorce. Nationwide, over one million children per year endure the divorce of their parents.<sup>11</sup> Research supports the theory that "the post-divorce family relationship is a key factor in the children's recovery from the divorce trauma."<sup>12</sup> Great concern for the welfare of the children echoes through the statutes and jurisprudence of the modern family law system. Louisiana law resounds with this concern for the best interest of the child. Thus,

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6. Kantrowitz & Wingert, *Step by Step*, Newsweek Special Edition: The 21st Century Family, Winter/Spring 1990, at 24-34 [hereinafter Kantrowitz & Wingert].

7. *Id.* at 27.

8. R. Gardner, *The Parents Book about Divorce* (1977).

9. A. Musetto, *Dilemmas in Child Custody* 34 (1982).

10. Mulroy, *supra* note 2, at 80.

11. Kantrowitz & Wingert, *supra* note 6, at 27.

12. P. Cohen, *Mediation: Facilitating Shared Parental Responsibilities*, in *Seeking Solomon's Wisdom: Symposium on Joint Custody* 141 (Loyola Association of Women Law Students ed. 1984).

whenever and however the legal system can offer methods for re-ordering relationships between children and their divorced parents so that conflict and bitterness are reduced for the child, the legal system should do so—in its pursuit of the child's best interest.

### *The System*

In Louisiana the children of the marriage are not represented by legal counsel when their parents divorce, nor are their interests protected by an appointed guardian ad litem as is done in some states.<sup>13</sup> Yet, Louisiana statutes and cases express great concern that the children's interests be protected.<sup>14</sup> Louisiana Civil Code article 146(C) establishes the presumption that an award of joint custody to both parents is in the best interest of the children, and such an arrangement is first in the statutory order of preference in making custody awards. The parents can agree to an award of custody to one parent,<sup>15</sup> the presumption can be rebutted by a showing that joint custody of both parents is not in the best interest of the child,<sup>16</sup> or the court can even award custody to a person other than a parent without the consent of the parents if the court finds that custody to a parent would be detrimental to the child, and that award to a nonparent would serve the child's best interest.

The clear duty of Louisiana judges was underscored by a Louisiana Supreme Court declaration in a 1984 case, that, in determining the custody of a child of a dissolved marriage

[t]he trial judge sits as a sort of fiduciary on behalf of the child, and must pursue actively that course of conduct which will be of the greatest benefit to the child. It is the child's emotional, physical, material, and social well-being and health which are the judge's very purpose in child-custody cases. He must protect the child from the harsh realities of the parents' often bitter, vengeful and typically highly emotional conflict. The legislature has mandated that the judge shall look only to the child's interest.<sup>17</sup>

While the imposition of such duty upon judges is an enormous responsibility, the duty itself is nonetheless clear. For the attorney consulted in divorce matters, on the other hand, there is a dilemma. Some

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13. See R. Schwartz, *A New Role for the Guardian Ad Litem*, 3 Ohio St. J. on Dispute Resolution, 117, 154-77 (1987); Podell, *The Role of the Guardian Ad Litem*, Trial, April 1989, at 31.

14. La. Civ. Code art. 146.

15. La. Civ. Code art. 146(C)(1).

16. La. Civ. Code art. 146(C)(2).

17. *Turner v. Turner*, 455 So. 2d 1374, 1379 (La. 1984).

attorneys see a clear moral duty to investigate and help the client/parent and the court determine what custody arrangement will serve the best interest of the children. If such an attorney determines that the arrangement the client wants is not in the best interest of the children, he or she may see a duty to dissuade the parent from seeking the intended arrangement. The attorney may be able to support his action with the valid argument that, in his knowledge and experience, given the facts in the case, he feels that the particular judge will refuse to order the client's preferred arrangement. Another attorney may feel bound to zealously pursue the reasonable legal wishes of his or her client and let the judge sort out the best interests of the children. Such an attorney may feel that the client, having lived with the other spouse and with the children, is in the best position to determine what arrangement would be in the children's best interests. Both positions are valid ethically, morally, and legally; both have much to recommend them under various circumstances; and it seems that no clear statement has been made legislatively or jurisprudentially to guide the attorney in his or her choice of position.

Because people who are considering divorce, as well as people who have decided upon divorce, often seek the advice of an attorney before taking any other action, the attorney potentially has great influence in both the individual divorce and, collectively, upon the divorce process itself. Given this influential power of the attorney, it may be valuable to consider what, in turn, influences the attorney's choice of treatment of divorce cases in general. That choice is likely to be governed to a large extent by the facts of the case itself, and the same attorney may take different positions in different cases. It can be assumed that the individual attorney's position will be influenced also by such factors as his own evaluation of his client's personality, the amount of conflict present between the divorcing spouses, the philosophy of the judge presiding over the case, the realities of the local court conditions, the financial condition of the client, and the position taken by the attorney for the client's spouse. Additionally, the attorney's choice of approach is likely to be greatly influenced by his or her own personality and attitude about legal divorce work generally.

Recent research into the attitudes of attorneys and how their approaches influence the client's divorce experience has identified "in a crude, but basically accurate fashion, two relatively stable and sharply contrasting approaches to legal work in divorce."<sup>18</sup> These two different "lawyering styles"<sup>19</sup> are designated "counselor" and "advocate."<sup>20</sup> The

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18. K. Kressel, *The Process of Divorce* 150 (1985) [hereinafter Kressel].

19. *Id.* at 150.

20. *Id.* at 144.

attorneys in the study classified as "counselors" generally adopted their role as a quasi-therapeutic one and, though some tended to sound paternalistic occasionally, most preferred an "interest in and acceptance of the client's emotional turmoil; the need to combine financial and practical advice with emotional support; and an interest in helping the client toward greater maturity and personal insight."<sup>21</sup> The views of the attorneys classified as advocates "contrasted sharply with those of the counselors."<sup>22</sup> Generally, the advocates rejected "any role which had even a hint of therapeutic coloring" and expressed skepticism about the value during divorce of any related psychological counseling.<sup>23</sup> They

gave greater weight to achieving a superior financial settlement; enjoyed divorce work for the challenge it poses and for the exercise of legal skills in the pursuit of victory for the client; felt that a principal obstacle to settlement was the client's neurotic behavior; were readier to endorse the value of an adversarial relationship with the opposing attorney; and were stronger in their rejection of responsibility for providing the client with emotional support.<sup>24</sup>

When one considers the fact that most people seek out a lawyer at the very beginning of the divorce process, the lawyer's own predisposition and his or her approach to management of the case may be pivotal in the impact the divorce has upon the family as a whole.

Yet another determination of how the divorcing couple and their children will experience divorce is the method or methods provided by statutory law for handling the various aspects and issues of the case. Louisiana's statutes provide much flexibility in this area.

### *The Statute*

Louisiana statutory law adopts the widely held and well-supported view that joint custody to both parents is the preferred post-separation and divorce arrangement.<sup>25</sup> Furthermore, the Louisiana child custody scheme espouses the purpose of assuring as close, frequent, and continuing a relationship as possible between the child and each parent.<sup>26</sup> Toward this end, if the court feels that it would be in the best interest of the child, or, when an issue of custody or visitation appears on the face to be contested in a proceeding related to separation or divorce,

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21. *Id.* at 146.

22. *Id.* at 147.

23. *Id.*

24. *Id.* at 145-46.

25. La. Civ. Code art. 146(A)(1).

26. La. Civ. Code arts. 146(C)(j), 146(D), 146(1).

the judge may order mediation before any litigation takes place or at any time during the proceedings.<sup>27</sup> This article will next summarize the main aspects of the statute, then briefly analyze the statute in view of some major concerns about the mediation process.

### *The Summary*

Legislatively, Louisiana has thus far taken an approach to the use of mediation in child custody disputes accompanying separation and divorce that seems generally wise, but perhaps overly cautious in some areas and not cautious enough in others. The Louisiana approach is wise in its flexibility. Unlike other states Louisiana has not made mediation mandatory in all cases in which issues of custody and visitation are contested but, if an initial order or a change to an existing order is being sought, the judge is given the power to make mediation mandatory in any individual case by ordering the parties to mediate. The judge can make such an order before any evidence is presented or at any time during the proceedings. The order may be given upon the motion of either party or upon the court's own motion when mediation appears to the court to be in the best interest of the children. The parties can select a mediator; or, if they fail to agree upon one, the court can make the selection.<sup>28</sup>

During the 1989 legislative session, the legislature amended the mediation statutes to allow the court to order costs of mediation to be paid in advance by either party or both parties jointly, and then to apportion the costs between the parties if agreement is reached on custody or visitation or to tax the costs of mediation as costs of court if there is no agreement. In every case, the court has the authority to approve mediation costs.<sup>29</sup>

The stated purpose of the mediation statutes is two-fold: first, "to reduce the acrimony which may exist between the parties, [and, second,] to develop an agreement assuring the child or children's close continuing contact with both parents after the marriage is dissolved."<sup>30</sup> The mediator must use "his or her best efforts to effect a settlement of the custody or visitation dispute," and is under a duty to be impartial.<sup>31</sup> The mediator must help the parties initially to formulate a written, signed, and dated agreement to mediate that must identify the issues in controversy, affirm the parties' intention to resolve their conflicts through mediation, and

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27. La. R.S. 9:351(A) (Supp. 1989).

28. La. R.S. 9:351(C) (Supp. 1989).

29. La. R.S. 9:351(B) (Supp. 1989) (became effective October 1, 1989).

30. La. R.S. 9:352 (Supp. 1989).

31. La. R.S. 9:352, 9:353(C) (Supp. 1989).

specify the circumstances under which the mediation may terminate.<sup>32</sup> The mediator is under a duty to advise each participant in mediation to obtain legal review before agreeing to final terms.<sup>33</sup> The mediator has no power to impose a solution, but if agreement is reached, the mediator must prepare a written, signed, and dated agreement setting out the settlement terms, and the mediator must verify the document.<sup>34</sup> This agreement becomes incorporated into a consent judgment prepared by counsel for each of the parties and submitted to the court for approval and signature.<sup>35</sup>

If no agreement is reached by the parties, the confidentiality of all communications between a party and the mediator and all communications between the parties in the presence of the mediator are preserved as privileged communication and cannot be admitted into evidence in any proceeding unless both parties consent.<sup>36</sup> To qualify as a mediator for the purposes of the mediation articles, one must be either an attorney who is a member in good standing with the Louisiana State Bar Association, or a person with a Master's degree in counseling, social work, psychology, or marriage and family counseling. The mediator must not be a party or a representative of a party, nor must he or she be engaged in any therapeutic relationship with the parties in dispute. If the parties select the mediator, they must name him or her as mediator in a signed agreement.<sup>37</sup>

### *Analysis*

A brief analysis of the statute as it addresses some of the major concerns about family mediation may be helpful in judging its theoretical effectiveness. The statute provides for the protection of the rights of divorcing spouses by encouraging the parties to review the agreement with their respective attorneys before giving final consent, and by requiring the attorneys to draft the consent judgment that incorporates the agreement. This provision should allow each party to be fully informed of any rights he or she has given up or compromised, and should, therefore, help him or her assess the overall fairness of the agreement and afford an opportunity to reflect upon its provisions before final commitment. On the other hand, review and advice by the attorneys could sometimes cause the parties to back out of mediation and go forward with litigation. This can be a positive thing in that it provides

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32. La. R.S. 9:353(A) (Supp. 1989).

33. La. R.S. 9:353(B) (Supp. 1989).

34. La. R.S. 9:353(C), 9:354(A) (Supp. 1989).

35. La. R.S. 9:354(B), 9:354(C) (Supp. 1989).

36. La. R.S. 9:355 (Supp. 1989).

37. La. R.S. 9:356 (Supp. 1989).



a check against such problems as biased mediators and domineering spouses. It can be negative in that such an opportunity may encourage a competitive or vindictive spouse to pursue litigation in the desire to win, bringing discord to the parents and trauma to the children where there could have been a compromise. Because a large share of the mediation done in the jurisdictions in which it is used is done by social workers who may not be as familiar with legal aspects, the provision for attorney review seems, on balance, important enough to the end of protecting the rights of each parent that it is worth risking the loss of mediation's benefits in some cases.

Holding the attorneys responsible for drawing up the final legal judgment based on the agreement or custody and visitation contract that the social worker has helped write provides some protection against the ethical problems of the possibility of encouraging the unauthorized practice of law. No guidance is offered the attorney, however, in the choice (discussed earlier in this article) that he or she must make concerning what role to assume toward the client about the custody issue. (As will be discussed later, practical considerations of the disposition and opinion of the judge handling the particular case and of the rules and procedures in the particular jurisdiction may preclude this dilemma.) Nevertheless, the fact that the custody statutes, the mediation statutes, and the jurisprudences place so great an emphasis on best interests of the child, coupled with the insistent, if not overwhelming, evidence that mediation fosters the kind of cooperation between parents viewed as crucial to the child's post-divorce well-being,<sup>38</sup> strongly indicate that the attorney should encourage and support mediation on at least the custody and visitation issues even if he cannot endorse mediation as an acceptable method for settling other divorce-related issues.

Another ethical problem for attorneys is addressed by the exclusion of an attorney from both representing a party and acting as a mediator between that party and his or her spouse. This provision and the provision requiring a party to obtain legal review before committing to any agreement would also seem to be adequate to keep an attorney from serving as mediator with no other independent legal counsel for either party, successfully precluding any ethical problem of dual representation or conflict of interest.

Although lawyers are qualified under the statute to act as mediators, most mediation both in Louisiana and nationally is done by mental health professionals—mostly social workers, followed by psychologists—

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38. F. Bienenfeld, *Helping Your Child Succeed After Divorce* 1-11 (1987); D. Flanders, *A Presumption of Joint Custody without Mediation: A Square Peg in a Round Hole*, in *Seeking Solomon's Wisdom: Symposium on Joint Custody* 169 (Loyola Association of Women Law Students ed. 1984). Also see discussion of results of interviews with Louisiana judges in the last section of this article.

or through public or charitable organizations offering family mediation services. Private mediation in most jurisdictions is more likely to be a voluntary process, whereas mediation through public agencies is more likely to be court-referred. The Louisiana statutes allow the divorcing couple who wish to mediate to choose their own mediator or to allow the court to appoint one. In addition to assuring that the mediator gets paid, the provision concerning costs of mediation added by the legislature this summer perhaps gives the judge the means to provide some economic incentive to encourage cooperation rather than obstinate resistance by one party when the other party is inclined to seek a non-litigated solution. At any rate, the provision gives the judge added flexibility in dealing with contested custody cases.

Confidentiality of mediation sessions is widely felt to be essential to the very process of mediation.<sup>39</sup> Yet, the need for confidentiality may conflict in many cases with the necessity of getting all pertinent information before the court so that the final custody arrangements might truly be in the child's best interest. In some jurisdictions in California, a state that mandates mediation in all contested custody cases, the mediator is required to give the judge a recommendation at the end of the prescribed number of mediation sessions if the parents do not reach an agreement. The judge bases the final decision heavily on that recommendation in most cases. The mediating couple knows all of this from the beginning of the mediation process. In theory, the knowledge that what goes on in the mediation process may be disclosed to the judge may stymie honesty and openness of the parties. The Louisiana Legislature chose to protect thoroughly what goes on in mediation by creating a privilege that would exclude from evidence not only anything that was said by either party to the mediator, but also anything that is said by either party to the other party in the presence of the mediator. Only through the consent of both parties can any communication associated with mediation be admitted into evidence. This summer, the legislature failed to pass a change in the mediation statutes proposed by the Louisiana Law Institute that would have replaced the establishment of a privilege with the statement that "[e]vidence of conduct or statements made in mediation is not admissible in any proceeding." The discarded proposal would also have gone on to state that evidence need not be excluded merely because it was presented during mediation if it could be discovered otherwise. Nor would any facts be inadmissible simply because they were first disclosed in mediation.<sup>40</sup> The legislature

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39. D. Saposnek, *Mediating Custody Disputes*, 51-52, 57-58 (1983).

40. HLS 89-697, H.B. No. 336, 15th Reg. Sess. 46 (1989). Was to have been La. R.S. 9:332(C), and was to have read: "Evidence of conduct or statements made in mediation is not admissible in any proceeding. This rule does not require the exclusion

seems adamant in providing thorough protection of confidentiality in mediation. Investigation into legislative intent and into the pros and cons of confidentiality is beyond the scope of this article, but it should be pointed out that the insistence on sanctity of communications in family mediation finds wide support by experts in the field.<sup>41</sup>

One argument that has been advanced against the use of mediation is that it may add an extra layer of cost and time to the divorce process if several mediation sessions prove fruitless in yielding an agreement, and the parties must resort to litigation after all. There are no statutory requirements or guidelines as to how many mediation sessions should be held, as to what those sessions should entail, as to how they should be conducted, or as to who should be included (other relatives, children, attorneys). This lack of requirements for a particular method or a particular number of sessions theoretically should allow a desirable flexibility for the individual judge, the individual mediator, and the parties to establish a mediation plan tailored to the needs of the court and the parties. Because experts in the field of family mediation are presently unable to form a consensus about ideal methods or number of mediation sessions, it would seem inappropriate for the legislature to identify such standards. As shall be discussed below, jurisdictions that use mediation to any great extent have generally established their own method for proceeding, and, in most cases, there does not seem to be any unjustified delay or cost.<sup>42</sup>

If the legislature were to establish any requirements, perhaps it should require one or two brief initial sessions with a qualified mediator for the purpose of conducting a sort of screening to help determine whether the couple and their situation preclude mediation. Such screening sessions should, when properly administered, neither cause great delay nor significantly increase costs.

The statutes provide two basic qualifications for the mediator: first, that he or she be an attorney in good standing with the bar or have a Master's degree in social work, psychology, or psychiatry; and second, that he or she not be engaged in legal representation of or the rendering of professional therapy to either party. And, of course, one of the parties cannot serve as mediator. These minimum requirements may be both overly inclusive and overly exclusive. A person who lacks one of the requisite graduate degrees may have renowned capacity for mediation

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of any evidence otherwise discoverable merely because it is presented in the course of mediation. Facts disclosed, other than conduct or statements made in mediation, are not inadmissible by virtue of first having been disclosed in mediation."

41. J. Folberg, Confidentiality and Privilege in Divorce Mediation, in *Divorce Mediation: Theory and Practice* 319 (J. Folberg & A. Milne ed. 1988).

42. See discussion of systems implemented by various Louisiana judges in the last section of this article.

and broad experience with its use, but such a person would be statutorily excluded from service as a mediator. However, the same could be said for any field that standardly requires specialized training of any sort.

The statutory qualifications are glaringly inclusive in their lack of requirement of any training in the mediation process itself. The consensus among experts in the field seems to be that a basis of thirty to forty hours of training in mediation is most desirable.<sup>43</sup> The statutes provide no guidance as to what the mediator is to do once he or she has the parties together or how he or she should attempt to handle difficult situations, in other words, just what the mediator's role is to be, except that the mediator must try to help the parties reach agreement. Training in mediation would at least provide guidance in these areas. Local jurisdictions would still be free to establish their own preferences concerning procedures and roles for the mediator. Although having had mediation training would no more insure competency of the mediator than holding any of the requisite graduate degrees would, it would at least assure greater familiarity with the process and potential problems. Professional mediation associations as well as experienced mediators could be looked to for help in establishing training requirements, number of hours, and experience. Admittedly, the establishment of a training requirement would then create the necessity for proof of training and perhaps some sort of certification, but perhaps affirming qualifications could be handled through local courts or already existing professional or administrative organizations without great additional burden or expense.

### *The Choices*

Family disputes are settled by one or a combination of processes that can be roughly divided into three basic categories: litigation, negotiation, and mediation.<sup>44</sup> In as much as eighty-five to ninety percent of divorce cases, agreements are reached through negotiation between the parties directly or indirectly through their attorneys before the cases get to trial.<sup>45</sup> While no data is available for Louisiana specifically, analysis of research in other jurisdictions indicates that, when the divorcing couples have children, the percentage of conflicts resolved with-

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43. LRPC Questionnaire—Response Outstanding and Revealing, *Mediation News*, Fall, 1989, at 7.

44. Some Louisiana jurisdictions, either by law or by administrative division, have courts that deal exclusively with cases within the area of family law, and interviews with some judges and practitioners in some of these courts, in addition to the general research of printed work reviewed, were helpful in forming many of the conclusions discussed in this as well as the next section of this article. Please see the last section of this article (entitled "In Louisiana") for further details of these interviews.

45. Green, Long & Murawski, *supra* note 1, at 195.

out court intervention is nearer to fifty percent.<sup>46</sup> Some courts use mediation extensively, even maintaining court-annexed mediation staff of some sort, and of the majority of cases handled traditionally through lawyers, not more than three percent have involved a divorce mediator in any capacity.<sup>47</sup> This is not to say that what goes on in these "negotiated" agreements may not in many cases closely resemble mediation with the attorneys playing quasi-mediator roles.

A definition of terms to clarify the meanings of statements is in order at this point. The terms "mediation" and "negotiation" are often confused. Even many practitioners—judges, attorneys, social workers, and mental health professionals—who are involved in family work and utilize the processes regularly tend to use the terms "mediation," "negotiation," and "evaluation" loosely, sometimes even using one as a shorthand for all three. Evaluation by a mental health professional is a tool by which insight into personalities and dynamics of relationships involved in the case may be brought before the court. However, in Louisiana the judge does not have statutory authority to order evaluation of the parties and their children in divorce and separation cases on his own motion; the judge may order an evaluation only on the motion of either party.<sup>48</sup> Evaluation involves the use of psychological tests and interviews that serve as the basis for a written report that must be provided to the court and both parties. Evaluation does not involve therapy or counseling.

Negotiation involves the communication or conferring between parties toward the end of reaching a settlement or agreement.<sup>49</sup> Mediation also fits this basic definition of negotiation and, indeed, negotiation is an integral part of mediation. The difference is that, while negotiation may be conducted between the parties directly, or through agents dealing with each other, mediation involves a neutral third party who intercedes between the two contending parties to persuade them to adjust or settle their dispute.<sup>50</sup> While the process of negotiation, whether mediated or not, can be extremely competitive, negotiation and mediation within the context of child custody disputes generally works toward the ideal of establishing a tone that is more conciliatory. That is, the goal of mediation in this context is to reach an agreement in a friendly, or at least unantagonistic, atmosphere in the hope of avoiding trial and establishing an ongoing spirit of cooperation between the parties who are separating from each other, but who will continue to share parenting

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46. Kressel, *supra* note 16, at 9.

47. *Id.* at 182.

48. La. Civ. Code art. 146(H)

49. Black's Law Dictionary 934 (5th ed. 1979).

50. *Id.* at 885.

responsibilities and, it is hoped, will continue their separate parental relationships with their children.<sup>51</sup>

The attributes and liabilities of the litigation and mediation processes must be examined in the context of the purpose and spirit of laws governing child custody associated with separation and divorce. First, there are the obvious differences that litigation is a formal proceeding held in a courtroom and subject to the rules of evidence and local court rules, and mediation is an informal process that can be held wherever the parties like, subject only to the rules to which they agree. Then, there are more subtle differences. When a custody case is litigated,

[t]he family members are acting as strangers to one another and the stranger (the judge) is put in the position of having to make an internal family decision: when parents and children can see one another. Once, however the parents have relinquished this decision to the judge, the parents' interests become unimportant, since the judge must make a decision based on his/her perception of the child's best interests.

Once the case goes to court, the attorneys use information to persuade and convince the judge of the rightness of their clients' positions. At that point, the parents have no need to convince each other, to seek common ground, or to coordinate their versions of the dispute. Information is used to substantiate a position, not to elucidate the problem. Incidents are abstracted from the family's past or ongoing situations to indicate or insinuate certain characteristics or habits of each parent. To perform his/her task the judge in custody adjudication must decide what to believe after hearing often contradictory evidence and make an assessment of each parent's ability and character. Thus, in attempts to influence the judge, the parents are engaged in actions which tend to polarize one another, which leaves them less invested in a meeting of the minds with the other parent. . . . The aspects which are emphasized or neglected in these cases are not based on what the mothers and fathers consider important in their parenting, but rather are selected in consideration of the legal criteria of admissibility and relevance. . . .

In mediation, as in negotiation, the disputing parties seek joint decisions and, therefore, are interdependent. Each can only have what the other allows. The parents must influence one another, not a third party. Information is used to communicate (i.e., enlighten, threaten, persuade, or inform) with the other party. Mediation does not necessitate that the disputing parties trust

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51. *Id.* at 262 (for the basic definition).

one another, but rather that they acknowledge their mutual needs to coordinate their interaction to reach an agreement.<sup>52</sup>

There have been no definitive or even conclusive studies determining whether litigation or mediation works more truly in the best interests of the child, but there has been much written, both pro and con, comparing the two processes in theory. Additionally, there have been some surveys comparing results in such areas as cost in time and money, levels of user satisfaction, and compliance and post-divorce adjustment. Results from the studies that have been done indicate that, in general, user satisfaction and compliance is considerably higher for mediation than for litigation, and that mediation costs are somewhat lower.<sup>53</sup> Furthermore, mediation seems to leave both parents with the view that the child custody arrangements they agreed upon are fair.<sup>54</sup> Although these studies have received much criticism,<sup>55</sup> the points that are criticized usually lie with investigative techniques rather than with basic results. The criticism is usually accompanied by a resonant call for more and better studies to help guide mediators in their work rather than to determine the value of mediation itself. In fact, although family mediation is such a new area,<sup>56</sup> there is every indication that it is "well on its way to becoming an established interdisciplinary field."<sup>57</sup> Most states, including Louisiana, statutorily allow the use of mediation in place of or in connection with litigation, some states make mediation mandatory,<sup>58</sup> and many states offer court-connected mediation services.<sup>59</sup> The American Bar Association has formed the Special Committee on Alternative Means of Dispute Resolution

which serves as a focal point for resources information in the field of dispute resolution, including divorce mediation. The Family Law Section of the ABA, which includes a Mediation and Arbitration Committee, has adopted Standards of Practice

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52. L. Girdner, *Adjudication and Mediation: A Comparison of Custody Decision-Making Processes Involving Third Parties*, in *Divorce Mediation: Perspectives in the Field*, 38 (C. Everett ed. 1985).

53. See H. Irving & M. Benjamin, *Family Mediation: Theory and Practice of Dispute Resolution* 231-50 (1987) [hereinafter Irving & Benjamin], for a summary and analysis of the research through 1985 which they describe at 232 as "research in various aspects of several different approaches to mediation with divorcing couples." See also P. Axelrod, C. Everett & A. Haralambie, *Custody and Visitation Mediation*, in *Handling Child Custody Cases: Family Law Series* 41-43 (A. Haralambie ed. 1983).

54. Research Supports the Value of Mediation, in *Mediation News*, Fall, 1989, at 4.

55. Irving & Benjamin, *supra* note 37, at 231-62.

56. The first text on family mediation was published only in 1978. *Id.* at 264.

57. Kressel, *supra* note 16, at 183.

58. California and Maine.

59. Green, Long, & Murawski, *supra* note 1, at 194.

for Family Mediators which have been "promulgated as a service to the matrimonial practice community."<sup>60</sup>

In 1986 an international conference was held to compare the role of mediation in divorce proceedings in the United States, Canada, and Great Britain.<sup>61</sup> A non-profit educational organization, The Academy of Family Mediators, was founded in 1981 to support the professional and social development of mediation. Training courses are now widely offered. Numerous professional and popular books and articles have been and continue to be written.

The first writings on mediation were almost exuberant and the list of advantages mediation was said to offer was dazzling. It was claimed that mediation:

- minimizes the impact of divorce on children
- promotes family privacy
- preserves self-worth of spouses
- encourages client participation and self-determination
- establishes new relationships within the divorcing family based on cooperative communication
- lessens financial and emotional costs of divorce
- reduces lawyer and court time spent in rendering final divorce
- minimizes state interference in dissolution of families
- produces agreements which are respected by the parties.<sup>62</sup>

As mediation came into wider use, it was acknowledged that serious problem areas existed. Some areas of major concern are:

- protection of the rights of divorcing spouses
- competence of mediators and a clear definition of their role
- ethical considerations for attorneys involved
- confidentiality of mediation sessions
- the extra layer mediation potentially adds to the divorce process
- actual success.<sup>63</sup>

Many methods of conducting mediation have been identified and espoused as superior to all others. None has yet emerged as the perfect model.

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60. *Id.*

61. The Trans-Atlantic Divorce Mediation Conference sponsored by the Vermont Law School Dispute Resolution Project and The Dispute Resolution Assistance Project Institute for Judicial Administration at New York was held in Burlington, Vermont on May 19-20, 1986. The theme and the title of the published proceedings was *The Role of Mediation in Divorce Proceedings: A Comparative Perspective* [United States, Canada, and Britain]. Presentations and proceedings were printed by Vermont Law School Dispute Resolution Project, South Royalton, Vermont in 1987.

62. Green, Long & Murawski, *supra* note 1, at 193.

63. Green, Long & Murawski, *supra* note 1, at 193-94.



[F]amily mediation in North America remains in a state of flux, characterized more by dissention than by consensus and more by diversity than homogeneity. Indeed, opinions and practice vary tremendously, from the form it should take, to the persons who should participate, to the values and norms being espoused.<sup>64</sup>

After all the enthusiasm, after all the criticism, and before further research and study offer definitive answers, the wisest stance would seem to be to acknowledge the known benefits and limitations of mediation as a process, and to establish an atmosphere in which the benefits are made available and the potential problems are limited.

Furthermore, the wisdom of using mediation is questionable in cases in which there has been abuse or violence within the family, in which one or both parties cannot negotiate for themselves because of mental or emotional problems, in which the power imbalance is too great, in which the issues are too complex, in which the couple has established patterns (such as avoidance of conflict or dominance and submission) and in which the parties simply are unwilling or unable to come to an agreement.<sup>65</sup>

Although it has not been conclusively decided just how successful mediation really is, some points are settled. Mediation does not seem to be significantly more effective in reducing "divorce related psychological distress than the adversarial. . . process."<sup>66</sup> Only time reduces anger, depression, stress, and guilt. Yet, mediation does seem to be a "viable and valuable way to resolve dispute arising out of divorce which is least traumatic to all the parties involved."<sup>67</sup> And mediation "[m]akes the family, rather than the legal system become the place of *first resort*, providing parental control over the issues which will influence the family members' lives."<sup>68</sup> It seems that the greatest value of mediation lies in the long-term effects the emphasis on communication and cooperation have on the ongoing relationship of the spouses who continue to share parenting responsibilities. Successful mediation seems to enable the couple to end their spousal relationship while separating and dealing more cooperatively with the issues that arise from the parental responsibilities they continue to share.<sup>69</sup>

Mediation cannot work in every case. There are still cases that, for many reasons, must be handled by traditional litigation. And, if in those

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64. Irving & Benjamin, *supra* note 37, at 264.

65. Green, Long & Murawski, *supra* note 1, at 193-94.

66. J. Kelly, L. Gigy & S. Hausman, Mediated and Adversarial Divorce: Initial Findings From A Longitudinal Study, in *Divorce Mediation: Theory and Practice* 472 (J. Folberg & A. Milne ed. 1988) [hereinafter Kelly, Gigy & Hausman].

67. Irving & Benjamin, *supra* note 37, at 250.

68. Axelrod, Everett & Haralambie, *supra* note 37, at 42 (emphasis in the original).

69. Kelly, Gigy & Hausman, *supra* note 50, at 472.

cases not amenable to mediation, litigation can put a swifter end to the immediate battle over the children and, through a judicially imposed arrangement, establish some degree of order by which the parents' responsibilities and privileges are regulated, then the route of litigation should be open. Mediation and litigation, as alternative methods of solving custody and visitation disputes, should provide the parties, the attorneys, and the judges with two options, either of which may offer advantages over the other in particular cases.<sup>70</sup> Because good post-divorce relationships are crucial to children's post-divorce adjustment, if mediation can contribute to better post-divorce family relationships in some cases, then Louisiana courts that deal in the determination of the best interests of the child for the purpose of establishing post-divorce custody and visitation arrangements would, seemingly, be well-advised to make use of the power to order mediation whenever the case provides a reasonable belief that mediation might be beneficial to the family. And those courts would, seemingly, be ill-advised to insist that every case go through lengthy attempts to mediate when mediation seems inappropriate. Therefore, courts should set up a screening process consisting of one or two short sessions with a qualified mediator who could determine whether mediation is appropriate in each case. If so, further mediation could be ordered. If not, the parties could proceed to litigation without further delay.

### *In Louisiana*

For the purpose of obtaining a Louisiana perspective on the use of mediation in cases of contested custody or visitation issues, the author interviewed five judges within the Baton Rouge and New Orleans areas about their attitudes and the use they made of their power to order mediation. All of the judges had served in a court that dealt exclusively with family law matters for an extended time. Three of the judges are currently serving in family courts. Attitudes of all five judges interviewed were very strongly positive that mediation in contested custody cases was the most desirable method of settling the issues. Of the three judges who are presently sitting in family courts, one orders mediation whenever she feels there is any chance for it to succeed. She relies to some extent upon impressions shared with her by attorneys for the parties and upon her own experience in deciding whether mediation is appropriate.<sup>71</sup>

Another of the three judges has the parties in contested custody and visitation suits meet with a social worker for a two-hour film and

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70. Irving & Benjamin, *supra* note 37, at 250. See also Kressel, *supra* note 16, at 283-87.

71. Interview with Judge Jennifer Luse, East Baton Rouge Parish Family Court, in Baton Rouge, La. (Oct. 1989).

lecture session in a program called "GRASP", which stands for General Responsibilities As Separating Parents. The children are not included in this meeting. The social worker is under contract with the court and handles the court-connected duties on a part-time basis. The social worker recommends that the parties consider mediation as an alternative to litigation. This judge prefers to convince the parties to mediate rather than to order mediation. Of those who choose to mediate, ninety percent reach an agreement. The judge feels that the attorneys often do not work in the best interests of the children and that mediation, while not perfect, provides a buffer against what he sees as the less appropriate system of litigation in which the judge must try to determine the best interests of the children of a family who are strangers to him on the basis of evidence that is often conflicting and incomplete. Mediation is an option to be elected by the parties. If the parties elect mediation but cannot afford a private mediator, the court refers them to Family Services.<sup>72</sup>

A judge who had presided over family court in the recent past, though he now sits on another bench, made a practice of referring all contested custody and visitation cases to mediation. Because the court is in a large metropolitan area, several charitable or public mediation services were available for parties who could not afford private mediation. Although his practice of one hundred percent referral met with resistance at first, he was encouraged by a settlement rate of eighty-five percent or better. He discovered that, as time went on, there were fewer requests for custody contests. Although the rate of settlement through mediation dropped to around fifty percent, he feels that the reason is that fewer and harder cases were being referred for custody. More cases were being settled beforehand through attorney and client negotiation, which led to the decrease in contested petitions for custody judgments. He felt that this increase in negotiated settlements was a positive side effect of his insistence on mediation. Though mediation was not itself used as the process by which parties reached mutual and voluntary agreement, the fact that mediation was mandatory caused the increase in voluntary agreement, and voluntary agreement in as many cases as possible was the goal he wished to achieve. When parties failed to reach agreements, this judge usually issued a temporary order establishing an arrangement that the parties tested for three to six months and then adjusted in an effort to work out difficulties and see what would succeed.<sup>73</sup>

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72. Telephone interview with Judge Charles V. Cusimano, Jefferson Parish (Nov. 1989).

73. Telephone interview with Judge Max Tobias, 5th Circuit Court of Appeals (Dec. 1989).

The third judge who is currently presiding in a family court also refers all contested custody or visitation cases to what he calls "Stage One Mediation." He does this by first mailing the parties a letter that explains his view that litigation is not a wise choice for the children's sake. In an attempt to prevent the parties from rushing to litigation in the heat of unresolved anger, he has established a procedural "flow chart" that the parties must follow. The first thing the parties must do is attend a one-hour session with the social worker who is employed full-time by the court. The parties' lawyers may attend this meeting. The social worker informs the parties that the judge is convinced they should work out a custody arrangement on their own because they can do a better job of it than the court can, and that the judge is affording them this opportunity to determine their own arrangements. She shows them a typical custody and visitation order that the judge uses routinely as an example of what they are likely to wind up with unless they make a plan of their own. If no agreement is reached, the judge calls the parties into court and delivers "a lecture" to them about the advantages of making their own arrangement. If there is still no agreement, the parties are required to attend a second session with the social worker at which they participate in a GRASP program (similar to that described above), which informs them of the harmful effects on children created by protracted discord between their separating parents. Because the court employs the social worker on a full-time basis and pays her salary with money available in the court's budget, this court can offer both sessions with the social worker and the judge's own "lecture" free to the parties.

If there is still no agreement at this stage, the judge enters an interim order. He is slow to order evaluation upon the request of either party, feeling that evaluation is often requested for vindictive reasons and to try to gain damaging evidence. However, he will order evaluation when he feels it would provide some information valuable to his decision. The parties return to court within a month or so. If there is still no agreement, he proceeds to try the case. He retains for himself in his "flow chart" plan the option of ordering mediation over a three-month period rather than proceeding to trial, but has not ever exercised that option. He feels that ordering long-term mediation does no good and simply "clogs the court docket later on." Parties can, at any time, however, (with the blessings of the judge) agree to long-term, or what he calls "Stage Two" and "Stage Three" mediation. If they have not agreed to mediate by their second session with the social worker, the possibility of successful mediation can, he feels, be fairly easily determined. If there is very little hope of successful mediation, and the parties seem intent on litigation, he delays them no longer.<sup>74</sup>

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74. Telephone interview with Judge Stephen A. Duczer, Twenty-Second Judicial District Court, Covington, Louisiana (Dec. 1989).

All judges interviewed seemed convinced of the value of mediation in any instance in which there was any possibility of success. The judges who were more forceful in suggesting or ordering mediation felt that it worked very well even under mandatory circumstances.

### *Conclusion*

In Louisiana, the power to influence the use or non-use of mediation in custody and visitation disputes currently rests in the judges. The legislature has provided them with great power. Although either party can request mediation, the parties need to know of the option and understand what it entails. Additionally, parents need to be aware of the damage to their children that can result from their divorce and to understand how their actions and behavior can increase or limit that damage. The individual attorney is one source of such information. The individual judge is another. A one or two-session program designed to inform and educate separating parents and to allow an experienced mediator to gain enough information to determine the appropriateness of mediation for each case can be a valuable tool in the quest to satisfy the child's best interests. If a skilled and experienced mediator can report any hope for a successful mediation after providing the separating parents with adequate information, the court should order mediation.

Those judges who have made aggressive efforts to convince parties of the wisdom of forming their own post-divorce custody arrangements report that they were very well satisfied with the resulting number of people who mediated successfully. Aggressive attempts to convince parties to mediate custody seems appropriate during the emotional turmoil typical in marriage dissolution and the high stakes involved in relation to the children's overall welfare. Parties are often so caught up in their own concerns that they forget to consider what is happening to their children. An awareness of the devastating effects divorce can have on children may be the necessary first step toward allowing the parents to separate the issues of custody from the anger the parents may feel toward each other and allowing those parents to work toward the best interests of their children. If there is no reasonable hope for successful mediation, the next best course seems to be getting the conflict settled as soon as possible through the traditional method of litigation. Nonetheless, wherever and whenever possible, mediation should be the first resort.

*Anita R. White*